

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

NANCY L. THOMPSON,

PLAINTIFF

VERSUS

CIVIL ACTION NO. 1:91-290-S-D

FECKEN-KIRFEL AMERICA, INC.
and FECKEN-KIRFEL OF GERMANY

DEFENDANTS

MEMORANDUM OPINION GRANTING DEFENDANT'S
MOTION TO DISMISS FOR LACK OF IN PERSONAM JURISDICTION

This cause is before the court on the motion of Fecken-Kirfel of Germany to dismiss for lack of in personam jurisdiction and forum non conveniens. This cause was removed by Fecken-Kirfel America, Inc. from the Circuit Court of Lee County. After substantial discovery, the plaintiff was allowed to amend her complaint to include Fecken-Kirfel of Germany, the designer of the alleged defective bandsaw which is purported to have injured the plaintiff. Service of process was effectuated on Fecken-Kirfel GmbH on July 6, 1994. Jury trial is set for this cause on Monday, October 3, 1994.

Facts

Fecken-Kirfel GmbH is a limited partnership organized and existing under the laws of the Federal Republic of Germany. Fecken-Kirfel America, Inc. is a subsidiary corporation of Fecken-Kirfel GmbH. Neither corporation has been or is now qualified to do business in the State of Mississippi. Fecken-Kirfel GmbH does not own any assets within Mississippi, does not employ any representatives or sales personnel in this state, does not engage

in any manufacturing business in the state, does not own real or personal property in the state, and does not maintain any bank accounts or offices in the state.

The plaintiff alleges that she was injured when operating a bandsaw while employed by Leggett and Platt in Tupelo, Mississippi. Fecken-Kirfel GmbH designed the bandsaw. Fecken-Kirfel America manufactured the bandsaw in New Jersey and assembled and installed it at Leggett and Platt. Plaintiff's case is based upon theories of negligence, strict product liability, and breach of warranty.

Burden of Proof

Once personal jurisdiction has been challenged, the plaintiff bears the burden of establishing the trial court's jurisdiction over nonresident defendants.

The plaintiff must demonstrate both that the long-arm statute applies and that minimum contacts exist with the forum state sufficient to satisfy the constitutional requirements of due process. When a nonresident defendant moves to dismiss for lack of personal jurisdiction, plaintiffs need not make a full showing on the merits that jurisdiction is proper but must make a prima facie showing of the facts upon which in personam jurisdiction is predicated to avoid dismissal for lack of jurisdiction. In this regard, "the allegations of the complaint, **except as controverted by the defendants' affidavits**, must be taken as true."

Strong v. RG Industries, Inc., 691 F.Supp. 1017, 1018 (S.D.Miss. 1988) (internal citations omitted).

Discussion

"A defendant is subject to the personal jurisdiction of a federal court in a diversity action only to the extent permitted a state court in the state where that federal court sits." Bailiff v. Manville Forest Products Corp., 792 F.Supp. 509, 510 (S.D.Miss.

1990) (citing Thompson v. Chrysler Motors Corp., 755 F.2d 1162, 1165 (5th Cir. 1985)). In a diversity action, a federal court must have jurisdiction over the defendants not only by means of the forum state's long arm statute, but also the nonresident defendant must have sufficient minimum contact with the forum state and jurisdiction cannot offend traditional notions of fair play and substantial justice implicit in the Due Process Clause of the Fourteenth Amendment. See Product Promotions, Inc. v. Cousteau, 495 F.2d 483 (5th Cir. 1974). The jurisdictional perimeters of a state's long arm statute and of the Due Process Clause are not mutually inclusive. Even if a defendant is within the forum state's long arm statute, the Due Process Clause may prevent the court from exercising jurisdiction.

Mississippi's long arm statute provides:

Any nonresident person, firm, general or limited partnership, or any foreign or other corporation not qualified under the constitution and laws of this state as doing business herein, who shall make a contract with a resident of this state to be performed in whole or in part by any party in this state, or who shall commit a tort in whole or in part in this state against a resident or nonresident of this state, or who shall do any business or perform any character of work or service in this state, shall by such act or acts be deemed to be doing business in Mississippi and shall thereby be subjected to the jurisdiction of the courts of this state.

Miss. Code Ann. § 13-3-57 (Supp. 1993). The long-arm statute requires the satisfaction of at least one of its conditions before it may be utilized. The tort provision requires that the tort be committed "in whole or in part in this state." "[A] tort is considered to have been committed in Mississippi where the injury

results in the state." Rippy v. Crescent Feed Commodities, Inc., 710 F.Supp. 1074, 1077 (S.D.Miss. 1988). Since the plaintiff alleges that she was injured while at work in Tupelo, Mississippi, the tort provision of Mississippi's long-arm statute empowers this court with jurisdiction.

Now the court must determine whether the exercise of this jurisdiction offends the Due Process Clause of the United States Constitution. The court's inquiry focuses on whether the nonresident defendant has (1) purposefully established "minimum contacts" with the forum state and, if so, (2) that the suit would not offend "traditional notions of fair play and substantial justice." International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

The concept of minimum contacts is a balance between protecting a "defendant against the burdens of litigating in a distant or inconvenient forum" and a state's desire to protect the interests of its residents and police the activities within its borders. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980). "The sovereignty of each State, in turn, implie[s] a limitation on the sovereignty of all of its sister States -a limitation express or implicit in both the original scheme of the Constitution and the Fourteenth Amendment." Id., 444 U.S. at 293. "[T]he Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment." Hanson v. Denckla, 357 U.S. 235, 251 (1958). The requirement that there be minimum contacts acts "to

ensure that the States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system." Woodson, 444 U.S. at 292.

"The minimum contacts the constitution requires depend on whether the court is asserting specific or general jurisdiction over the defendant." Villar v. Crowley Maritime Corp., 990 F.2d. 1489, 1496 (5th Cir. 1993). "[S]pecific exercise of jurisdiction may occur when the lawsuit arises out of the defendant's contact with the forum state." Rippy, 710 F.Supp. at 1077. "[E]ven a single purposeful contact is sufficient to satisfy the due process requirement of 'minimum contacts' when the cause of action arises from the contact." Thompson v. Chrysler Motors Corp., 755 F.2d 1162, 1172 (5th Cir. 1985) (citation omitted).

In Sorrells v. R & R Custom Coach Works, 636 So.2d 668 (Miss. 1994), the Mississippi Supreme Court did a beautiful job of concisely articulating the limitations which the Due Process Clause places upon a state's exercise of specific jurisdiction concerning the placement of a product into the "stream of commerce."

Where a forum seeks to assert specific jurisdiction over an out-of-state defendant who has not consented to suit there, this "fair warning" requirement is satisfied if the defendant has "purposefully directed" his activities at residents of the forum, [] and the litigation results from alleged injuries that "arise out of or relate to" those activities []. Thus "[t]he forum State does not exceed its power under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State" and those products subsequently injure forum consumers. [].

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The "substantial connection," [], between the defendant and the forum State necessary for a finding of minimum contacts must come about by an action of the defendant purposefully directed toward the forum State. []. The placement of a product into the stream of commerce without more, is not an act of the defendant purposefully directed toward the forum State. Additional conduct of the defendant may indicate an intent or purpose to serve the market in the forum State....But, a defendant's awareness that the stream of commerce may or will sweep the product into the forum State does not convert the mere act of placing the product into the stream into an act purposefully directed toward the forum State.

Sorrels, 636 So.2d at 674 (citations omitted); see Asahi Metal Industry Co. v. Superior Court, 480 U.S. 102, 112 (1987).

The Fecken-Kirfel GmbH did not even place a product into the stream of commerce. It only provided Fecken-Kirfel America, Inc. with the design plans. It has had no contact with Mississippi. The plaintiff asserts that jurisdiction can be imputed upon Fecken-Kirfel GmbH since the court has jurisdiction over Fecken-Kirfel America, the subsidiary/alter-ego of Fecken-Kirfel GmbH. The plaintiff bears the burden to prove jurisdiction and has failed to provide proof that Fecken-Kirfel America is strictly a shell corporation of Fecken-Kirfel GmbH, instituted to protect it from liability. "[C]ourts construing Mississippi law have determined that commonality of ownership or officers, absent more, is not sufficient for application of the piercing doctrine." North American Plastics, Inc. v. Inland Shoe Mfg. Co., 592 F.Supp. 875, 879 (N.D.Miss. 1984).

Additionally, the court cannot exercise jurisdiction over Fecken-Kirfel GmbH under circumstances that would offend

"traditional notions of fair play and substantial justice."

International Shoe, 326 U.S. at 316.

A court must consider the burden on the defendant, the interests of the forum State, and the plaintiff's interest in obtaining relief. It must also weigh in its determination "the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and the shared interest of the several States in furthering fundamental substantive social policies."

Asahi Metal, 480 U.S. at 113 (quoting Woodson, 444 U.S. at 292).

The court finds that it would be extraordinarily burdensome upon Fecken-Kirfel GmbH to be subject to trial in the Northern District of Mississippi. The plaintiff can completely resolve her claim with the remaining defendant. Fecken-Kirfel America manufactured, advertised, and distributed the bandsaw. Under the theory of strict liability, Fecken-Kirfel America can be held liable for any design defect if that is proven to be the proximate cause of the plaintiff's injury.

Accordingly, IT IS ORDERED:

That the motion to dismiss for lack of in personam jurisdiction filed by Fecken-Kirfel GmbH is granted. The plaintiff's complaint against Fecken-Kirfel GmbH is dismissed without prejudice.

That the motion to continue trial filed by Fecken-Kirfel GmbH is now moot and, accordingly, denied.

An order in accordance with this memorandum shall be issued.

This _____ day of September, 1994.

CHIEF JUDGE